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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 461

GEORGE F. SALOMON,
Petitioner,

against

THE CITY OF NEW YORK,
Respondent.

PETITIONER'S REPLY BRIEF

GEORGE F. SALOMON,
Pro Se.

ROBERT C. BIRKHAHN,
of Counsel.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3243

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a

The burden of the opposing brief is to dwell on the merits of respondent's alleged defense of *res adjudicata* in the State Court action.

Admonished by counsel that this Court, in acting on petitions for review, does not rule on the merits of the case, your petitioner refrained from dwelling thereon in his petition except to point out briefly that the validity of the alleged Federal decrees upon which respondent relies are in issue in the State Court action and that petitioner believes himself to be entitled to have their binding effect upon him and his claim in suit determined in the pending State Court action.

b

The question here is whether a Federal Court may enjoin an action pending in the State Court merely because in an alleged prior decree in the Federal Court, in a proceeding claimed to have adjudicated the same issues, the Federal Court enjoined non-assenting Manhattan 7% guaranteed stockholders in advance from suing the respondent to enforce their rights as such.

Counsel avoids answering this question by stating, on page 8, that, pursuant to the Federal decrees relied on, "substantial properties in the custody of the Federal Court had been conveyed to the City (respondent), as purchaser", and contending that, therefore, the Federal Court, to protect the City's title, was authorized to effectuate its decrees by injunction.

But respondent's petition for injunction was not predicated on any such ground or need. The record shows that the sole ground alleged was that the petitioner's claim in suit had been decided adversely in alleged prior proceedings in the Federal Court, and that, by decrees therein, petitioner had been in advance enjoined from suing respondent upon his claim in suit (Pet. Rec. p. 7, fol. 20).

Furthermore, the record also shows that the action in the State Court does not challenge the respondent's title to property nor seek to enforce any alleged lien thereon. It is nothing more than an action *in personam* wherein recovery of a money judgment upon a personal claim only is sought (Op. in C.C.A. Rec. p. 76).

This Court, in *Mandeville* v. *Canterbury*, 318 U. S. 47, 49, recently held, that

> "Where the judgment sought is strictly in personam for the recovery of money a State Court may proceed and judgment in either may be set up as res adjudicata in the other."

c

The only approach to the question at bar is the statement in the last paragraph on page 8 of the opposing brief that,

> "The inclusion of injunctive provisions in orders and decrees in connection with plans of reorganization in equity receiverships is of long standing practice and their validity and enforceability is unquestioned."

This statement constitutes nothing more than a contention, predicated upon a challenged assumption, that the acquisition by the respondent of its railway system via a private agreement between itself and certain security holders of the Interborough and Manhattan Companies, to which the petitioner admittedly was not a party (Resp. Brief, p. 9), "was a reorganization in an equity receivership".

Whether the agreement for the purchase and sale of the said securities constituted a "reorganization", as a matter of fact and law; and whether the alleged Federal decree, approving such agreement at the solicitation of the parties thereto, is valid and binding upon non-assenting stockholders, including the petitioner, are the very questions awaiting determination in the State Court action; and petitioner contends that such determination may not be barred by injunction merely because it is alleged that the decree in the alleged "reorganization" proceeding enjoined non-assenting stockholders in advance from suing the respondent to enforce their rights as such.

d

This Court, in construing the scope of Section 265 of the Federal Judicial Code, in *Toucey* v. *New York Life*

Ins. Co., 314 U. S. 118, cited Taylor & Willis, "The Power of Federal Courts to Enjoin Proceedings in State Courts", 42 Yale Law Journal 1169.

The writers point out at page 1176 that, "The Federal jurisdiction may be sufficiently protected by the availability of review in the Supreme Court. If the State Court fails to give the Federal Court's judgment the effect to which it is entitled under the constitution, the party pleading 'res adjudicata' may seek certiorari from the Supreme Court and thus secure a federal determination of this federal question, *Southern Railway Co.* v. *Painter,* 314 U. S. 155."

Besides, a federal determination could have been immediately secured by removal of the controversy in the State Court to the Federal Court (2d Fed. Sup. 841).

e

Your petitioner notes in conclusion, that these able writers point out further, at page 1190, with reference to the specific question under consideration, in substance, that injunctions in advance, if recognized and followed, would completely emasculate the statute, because their intended and inevitable effect would be to stop State proceedings.

Such recognition of the alleged "prior injunction" by the courts below in the case at bar, if permitted to stand, might very well result in inculcating a custom to incorporate an injunction in advance in every Federal Court decree and thus furnish a ready means of circumventing the Congressional intent in the enactment of Section 265 of the Federal Judicial Code and the pronouncement of this Court in the *Toucey* case, *supra,* that

"The purpose and direction underlying the provision is manifest from its terms; proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court."

Respectfully submitted,

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